

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN**

SHERRY GAINES, individually and on
behalf of others similarly situated,

Plaintiff,

v.

NATIONAL WILDLIFE
FEDERATION,

Defendant.

Case No. 4:22-cv-11173-FKB-CI
Hon. F. Kay Behm
Magistrate Judge Curtis Ivy, Jr.

**DEFENDANT NATIONAL WILDLIFE FEDERATION’S
MOTION FOR LEAVE TO FILE RESPONSE
TO NOTICE OF SUPPLEMENTAL AUTHORITY**

Defendant National Wildlife Federation (“NWF”) respectfully moves the Court for leave to file a response to Plaintiff’s Notice of Supplemental Authority (the “Notice”), filed March 31, 2023 (ECF No. 33).

1. In their Notice, Plaintiff enclosed, mischaracterized, and made implicit arguments based on *Batts v. Gannett Co.*, Case No. 4:22-cv-10685, ECF No. 28 (E.D. Mich. Mar. 30, 2023).

2. In view of Plaintiff’s misstatements and arguments, Defendant respectfully seeks leave to submit a response to Plaintiff’s Notice. The proposed Response to Notice of Supplemental Authority is attached hereto as Exhibit A.

3. Pursuant to Local Rule 7.1(a), Defendant’s counsel certifies that on April 12, 2023, they communicated with Plaintiff’s counsel, explaining the nature

of the relief sought in this Motion and seeking concurrence in that relief. Plaintiff's counsel stated that Plaintiff would not oppose a three-to-five-page response to the Notice.

Dated: April 14, 2023

Respectfully submitted,

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**BRIEF IN SUPPORT OF DEFENDANT NATIONAL WILDLIFE
FEDERATION'S MOTION FOR LEAVE TO FILE RESPONSE
TO NOTICE OF SUPPLEMENTAL AUTHORITY**

STATEMENT OF ISSUES PRESENTED

1. Whether National Wildlife Federation should be granted leave to file a response to Plaintiff's misstatements and arguments in her Notice of Supplemental Authority?

Defendant's Answer: YES.

STATEMENT OF CONTROLLING/MOST APPROPRIATE AUTHORITY

The controlling and most appropriate authority for this Motion includes:

1. *United States v. Van*, No. 06-20491, 2021 WL 4962139 (E.D. Mich. Oct. 26, 2021).
2. *Tokarczyk v. A.G. Edwards & Sons, Inc.*, No. 08-12481, 2009 WL 1025392 (E.D. Mich. Apr. 15, 2009).
3. *Batts v. Gannett Co.*, Case No. 4:22-cv-10685, ECF No. 28 (E.D. Mich. Mar. 30, 2023).

Defendant National Wildlife Federation (“NWF”) respectfully seeks leave to submit a response to Plaintiff’s Notice of Supplemental Authority (the “Notice”), filed March 31, 2023 (ECF No. 33).

ARGUMENT

In her Notice, Plaintiff enclosed, misstated, and made implicit arguments on *Batts v. Gannett Co.*, No. 4:22-cv-10685, ECF No. 28 (E.D. Mich. Mar. 30, 2023). Plaintiff wrongly stated or implied, among other things, that: (1) the court in *Batts* had ruled or considered whether plaintiffs in *Batts* had adequately pled disclosure under Rule 12(b)(6) and further, that that court had considered *Nashel v. New York Times Co.*, No. 2:22-cv-10633, 2022 WL 6775657 (E.D. Mich. Oct. 11, 2022) in doing so; and (3) the court had considered arguments on COVID-19 tolling and had further considered arguments on the effect of such tolling on absent class members and the date range applicable to the putative class.

In view of Plaintiff’s misstatements and arguments, which would provide Plaintiff with an unfair advantage if left unanswered, Defendant respectfully seeks leave to submit a response to Plaintiff’s Notice. *See, e.g., Tokarczyk v. A.G. Edwards & Sons, Inc.*, No. 08-12481, 2009 WL 1025392, at *1 n.1 (E.D. Mich. Apr. 15, 2009) (denying a motion to strike a response and notice of supplemental authority but granting the opportunity to file a supplemental pleading to address newly raised arguments and caselaw); *United States v. Van*, No. 06-20491, 2021

WL 4962139, at *2 (E.D. Mich. Oct. 26, 2021) (allowing defendant to file a response to a notice of supplemental authority concerning an opinion entered after briefing to argue new opinion was wrongly decided); *Smith v. Stellar Recovery, Inc.*, No. 15-cv-11717, 2017 WL 1336075, at *8 (E.D. Mich. Feb. 7, 2017) (allowing defendant to respond to plaintiff's notice of supplemental authority). The proposed Response to Notice of Supplemental Authority is attached hereto as Exhibit A.

CONCLUSION

For the foregoing reasons, NWF respectfully requests that it be granted leave to file a response to Plaintiff's Notice of Supplemental Authority.

Dated: April 14, 2023

Respectfully submitted,

/s/ Kristen C. Rodriguez
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*Counsel for Defendant
National Wildlife Federation*

Certificate of Service

I hereby certify that on April 14, 2023, a copy of the foregoing document was filed electronically and served by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing.

/s/ Kristen C. Rodriguez
Kristen C. Rodriguez